

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NATAI WILLIAMS

Claimant

VS.

DURHAM SCHOOL SERVICES

Respondent

AND

FIDELITY & GUARANTY INS.

Insurance Carrier

Docket No. 1,027,861

ORDER

Respondent and its insurance carrier (respondent) requested review of the October 13, 2006, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) noted that claimant is unable to return to employment with respondent until the authorized treating physician, Dr. Robert Eyster, responds to Department of Transportation (D.O.T.) paperwork. The ALJ ordered respondent to pay claimant temporary total disability benefits until she is returned to gainful employment.

Respondent requests review of the ALJ's order granting claimant temporary total disability benefits, claiming claimant failed to meet her burden of proof that she is temporarily totally disabled as a result of her work injury. Respondent contends the ALJ exceeded his jurisdiction when he ordered payment of temporary total disability benefits when claimant has been released to return to work and, in fact, did work for several weeks after that release.

Claimant argues the ALJ did not exceed his jurisdiction in ordering respondent to pay temporary total disability benefits, claiming she is temporarily totally disabled based upon Dr. Eyster's failure to complete the D.O.T. paperwork.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record presented to date, together with the briefs of the parties, the Board finds and concludes that it does not have jurisdiction of the issue raised at this juncture of the proceedings and, therefore, this appeal from the ALJ's preliminary order should be dismissed.

Claimant is employed by respondent as a school bus driver. On January 18, 2006, the bus she was driving collided with a vehicle that had run a red light. Claimant injured her upper back. Respondent referred her to Dr. Eyster for treatment. Dr. Eyster restricted her from driving a bus until August 15, 2006. Claimant returned to work on August 15 and drove a bus for three weeks. However, claimant's D.O.T. certification had expired while she was off. Claimant met with a doctor in order to be recertified. One of the questions claimant was asked was which medications she had taken in the previous six months. Although at the time claimant was no longer taking any medication, she answered that she had previously taken Lortab and Tramadol.

The doctor claimant saw for recertification advised her that he could not pass her until Dr. Eyster filled out some paperwork. Respondent informed claimant that they had forwarded the paperwork to Dr. Eyster but, up to the date of the preliminary hearing, neither claimant nor respondent had received the completed paperwork from him. Claimant requested temporary total disability benefits from August 29, 2006, her last day of work for respondent.

Claimant admits that around the first of August 2006, she applied for and obtained a job with INFONXX. However, she said that after working one week, she was contacted by respondent telling her that she could return to work, so she quit her job with INFONXX and went back to work for respondent. She admits she was physically able to perform the work at INFONXX. She stated she would still be working for INFONXX if respondent had not called her telling her she could return to work driving a school bus. She admits that she is physically able to drive a school bus.

Claimant states she has applied for a job with Collections, Etc. after August 29, 2006. As of the date of the preliminary hearing, she had not heard whether she would be hired. She testified that she would prefer working for respondent because she enjoys the job.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.¹ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are

¹ K.S.A. 2005 Supp. 44-551.

(1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain other defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.²

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue of whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.³

An ALJ has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing. Accordingly, the ALJ did not exceed his jurisdiction by awarding temporary total disability benefits and the Board, therefore, does not have jurisdiction to address this issue at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁴ Accordingly, claimant's appeal is dismissed.

The claimant may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statutes provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

WHEREFORE, it is the finding, decision and order of this Board Member that the appeal from the Order of Administrative Law Judge Thomas Klein dated October 13, 2006, is dismissed.

IT IS SO ORDERED.

² *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

³ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁴ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

Dated this _____ day of December, 2006.

BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge